Supreme Court
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in the

Supreme Court

of the

United States

October Term, 1974

No. 74-455

RESPONSE OF CAROLINA, INC.
AND
DATATRON CORPORATION,

Petitioners,

against

LEASCO RESPONSE, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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S. FOWLER & CO., INC. — 625-7663 — 525-3351

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Petitioners, Response of Carolina, Inc. and Datatron Corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

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*Appendix contained herein.

the Fifth Circuit entered in the above styled case on July 31, 1974. Petition for rehearing and for rehearing *en banc* was filed on August 10, 1974. By order dated October 8, 1974 the Court of Appeals denied petitioners' request.

OPINIONS BELOW

The opinion of the Court of Appeals in *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir. 1974) appears in Appendix D hereto. The order of the Court of Appeals denying the petition for rehearing and for rehearing *en banc* appears as Appendix E. The decisions and orders of the District Court have not been reported officially, but appear in Appendices F, G, H and I hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 31, 1974. The petition for rehearing and for rehearing *en banc* was denied on October 8, 1974, and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER INJUNCTIVE RELIEF IN ANTITRUST CASES IS LIMITED TO REMEDIES PROVIDED IN 15 U.S.C. §26, OR WHETHER INJUNCTIVE RELIEF MAY ALSO ISSUE UNDER 28 U.S.C. §1651.

2. WHETHER THE FACT THAT THE PETITIONERS WILL LOSE THEIR BUSINESSES AND THUS BE UNABLE TO FINANCE THE PENDING ANTITRUST LITIGATION, MERITS A FINDING OF IRREPARABLE HARM GIVEN THE CONGRESSIONAL POLICY OF ENCOURAGING PRIVATE "ATTORNEYS-GENERAL" TO BRING ANTITRUST ACTIONS.

FEDERAL STATUTES AND FEDERAL RULE INVOLVED

Section 26 of the United States Code, Title 15 (15 U.S.C. §26), Section 1651 of the United States Code, Title 28 (28 U.S.C. §1651) and Rule 65 of the Federal Rules of Civil Procedure are printed in Appendices A, B and C to the Petition, respectively.

STATEMENT

Petitioners, Response of Carolina, Inc. (hereinafter "Response"), a North Carolina corporation, and Datatron Corporation ("Datatron"), a Kentucky corporation, are plaintiffs in two of four related actions pending in the United States District Court for the Southern District of Florida.* Petitioners sued Leasco Response, Inc. ("Leasco") alleging violations of the *Sherman* and *Clayton Acts*, conspiracy, common law deceit and breach of contract. The District Court took jurisdiction under 28 U.S.C. §1337 and ancillary and pendent jurisdiction.

Petitioners are franchisees of Leasco under a franchise agreement involving the leasing of computer equipment (hardware) and the use of certain computer programs (software). The contract required payment by petitioners to Leasco of a franchise fee, equipment rentals, and maintenance charges. In addition the franchise agreement required royalty fees equal to fifteen percent of the gross receipts for sales inside the petitioner's assigned territories and seventy percent of the gross receipts for sales outside of the assigned territories.

Petitioners, after many failures by Leasco to perform satisfactorily under the contract and after several anti-competitive activities by Leasco, ceased making rental and royalty payments. Petitioners charged that Leasco violated

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*The consolidated cases are currently set for trial in the United States District Court for the Southern District of Florida on November 4, 1974.

the antitrust laws by illegal territorial restraints implemented by the provision requiring a 70% "royalty" of sales made by a franchisee outside of its assigned territory; by preference shown to Leasco owned computer centers competing horizontally with the franchisees; by arrangements and price fixing through the imposition of minimum revenue requirements combined with territorial restrictions; and an absence of reasonably fit products for sale. Although both of the petitioners are franchisees of Leasco, the events leading to the issuance of injunctions in favor of each of the petitioners are substantially dissimilar.

One day prior to Carolina's filing of its action, Leasco brought suit in the state court of North Carolina seeking possession of the leased computer equipment and unpaid rentals. Carolina vigorously contends that the entire contract is void under the federal antitrust laws and therefore unenforceable. There being no viable antitrust defense under the laws of North Carolina to this action since the antitrust laws vest exclusive antitrust jurisdiction in the federal courts,* Carolina was unable for a want of jurisdiction in the state courts of North Carolina to litigate this antitrust defense. Moreover, Carolina could not remove the action to the United States District Court for the Western District of North Carolina since 28 U.S.C. §1441(b) prohibits removal if, as is the case here, the defendant is a citizen of the state in which the action is brought.

In addition to filing the action against Carolina, Leasco had threatened and interfered with Carolina in the

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*15 U.S.C. §15.

ordinary course of business, and, as found by the District Court, threatened Carolina's customers. Carolina moved to enjoin Leasco from further destruction of its business. The District Court found after an evidentiary hearing that unless restrained Leasco's present course of action toward and against the petitioner would substantially and irreparably damage the petitioner's business and very existence. (App. F) After so finding, the District Court enjoined Leasco from further prosecuting the state court action, from threatening or interfering with Carolina in its ordinary course of business, and from threatening or enticing Carolina's customers.

Datatron filed a petition for a temporary injunction to stop Leasco and its agents from forceably removing computer hardware from Datatron's possession in Louisville, to restrain Leasco from further disturbing and disrupting petitioner's business, and to stop Leasco's refusal to deal with Datatron. The District Court after an evidentiary hearing found that damage to the petitioner would in all likelihood be substantial and irreparable. The District Court enjoined Leasco from failing to perform any act under the contract between it and Datatron, from removing any equipment from Datatron's possession, and from harassing Datatron's employees or business operations. (App. H) At no time did Datatron seek, nor did the District Court grant, any injunction with regard to any state court action, since none had ever been filed.

Leasco appealed from the issuance of the injunctions in each case. Subsequently, upon motion by Leasco, the

District Court entered amended preliminary injunctions. (App. G, I) Leasco also filed notice from the amended preliminary injunctions.

Leasco challenged the issuance of the injunctions on appeal on the basis that the injunction had no legal basis under the antitrust laws, specifically 15 U.S.C. §26. In its opinion entered July 31, 1974 the Court of Appeals reversed the District Court, and on October 8, 1974 entered an order denying a timely petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

A. Important Federal Question

The decision of the Fifth Circuit in this case incorrectly resolved a question of federal law which has not been decided by this Honorable Court. The question presented is whether injunctive relief in antitrust cases is limited to remedies under 15 U.S.C. §26, or whether injunctive relief is also available under 28 U.S.C. §1651. Petitioners urge that the court below erred in limiting its approach only to a consideration of 15 U.S.C. §26. Petitioners respectfully suggest that this Court should decide this question due to its paramount importance to antitrust litigants.

The opinion below had the effect of holding that since the harm to petitioners arose from conduct which was not violative of antitrust laws, injunctive relief was not available. *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir. 1974), at 317. In reaching this conclu-

sion, the court relied upon *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), *cert. den.* 404 U.S. 872 (1971). In *Helfenbein*, the Eighth Circuit stated:

> Under these circumstances this alleged 'loss' cannot be the basis of injunctive relief under 15 U.S.C.A. §26. If not authorized under §26 injunctive relief cannot otherwise issue. *Id.* at 1071.

It is this language in *Helfenbein*, forming the basis of the decision below, which petitioners urge resulted in the error now presented before this Court.

Petitioners concede that §26 is the most obvious source of authority for the issuance of injunctive relief in antitrust actions. It is also the most frequently used because the standard of "threatened loss" appears to be less demanding than the general equitable standard of substantial threat of irreparable injury. Petitioners, however, would strongly urge that in a situation such as the one at bar, the Court should not be restricted to §26 as a basis for injunctive relief.

There are four procedural requirements necessary for the issuance of an injunction. The Court must find: (1) a substantial likelihood that plaintiffs will prevail on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that upon balance, threatened harm to plaintiffs outweighs the injury to defendant; and (4) the injunction will provide no disservice to the public interest. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). The District Court, using this traditional analysis, issued the

injunction. In overturning the decision, the Court of Appeals did not challenge the District Court's findings regarding the requisites for injunctive relief, but merely held that since the irreparable injury required under the general equitable principles did not arise from portions of the contract attacked as violative of antitrust laws, no injunction could stand. *Response of Carolina* at 319.

Petitioners urge that given the findings of the District Court, an injunction under 28 U.S.C. §1651 was proper. This statute, in pertinent part, provides:

> §1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * *

This "all writs" statute provides a source of injunctive relief if the above-cited criteria are met. Petitioners submit such criteria were met and that the Court of Appeals erred in failing to utilize this means of injunctive relief.

Jurisdiction in private antitrust actions promotes the policy of Congress by encouraging private citizens to pursue antitrust violations. The injunction sought in the instant case would maintain the status quo while allowing petitioners to pursue the resolution of the case without undue hardship to Leasco. Without the injunction, petitioners, as found by the District Court and not contested by Leasco

in the Court of Appeals, will be put out of business, thereby losing the means of financing what most certainly will be elongated and costly litigation. This fact was noted by the court below, but held to be irrelevant in the present case. The injunction as granted by the District Court will provide an effective means for this Court to implement the congressional policy behind the antitrust laws.

B. Conflict with Applicable Decisions of this Court

Petitioners submit that the Fifth Circuit decided the case below in a manner which conflicts with applicable decisions of this Court. The court below based its decision upon *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947), and its progeny. In doing so, the court found that the case at bar did not fall under the exception stated in *Continental Wall Paper Co., v. Lewis Voight & Sons Co.*, 212 U.S. 227 (1909). Petitioners suggest that the manner in which the lower court applied these cases is contrary to the purposes and intent evidenced in these decisions.

In *Bruce's Juices, supra,* this Court held that antitrust claims could not be raised as defenses in suits on notes representing the purchase price of goods sold and delivered. This result can be avoided only if, by enforcing the contract, the court will become a party to the carrying out of some one of the restraints forbidden by the *Sherman Act. Continental Wall Paper Co., supra,* at 261.

Petitioners submit that by applying *Bruce's Juices* to cases such as the one at bar, the Circuit Court has frustrated both the congressional purpose as well as the intent of this Court as expressed in *Bruce's Juices.* In *Bruce's*

Juices, this Court was concerned with the possibility of unjust enrichment. The plaintiff had received goods from the defendant, sold them and was attempting, by raising the antitrust defense, to avoid payment. There were two factors present in *Bruce's Juices* which warranted the result. First, in allowing the antitrust defense to prevail, the Court would have foreclosed the only opportunity the plaintiff had to litigate the debts in question. It was possible that some of the debts did not arise as a result of antitrust violations. The second factor is that the result of the Court's decision regarding the antitrust violation would merely affect the profit received by the defendant on the sale in question. There was no danger that in disallowing the antitrust defense the Court would force the defendant out of business.

In the case at bar, these factors are not present. Leasco will not lose its opportunity to litigate the alleged debts. Since the issue arose in an injunction setting, the stay of the State Court proceeding will only last until the case at bar is settled, not in perpetuity as in *Bruce's Juices*. In the pending actions, Leasco has counterclaimed for amounts equal to the claims raised in State Court. Thus, there is certain to be a judicial determination of the validity of the alleged debts.

As to the second factor, petitioners are certain to lose their business unless the injunction remains effective. The District Court issued each of the injunctions only after finding that the petitioners would be put out of business absent the injunction.

And, as petitioners have urged throughout this Petition, the destruction of their businesses will seriously handicap the continuation of this suit. Petitioners submit that since these important factors are not present in the case at bar, the application of *Bruce's Juices* was erroneous.

As further support of the position that the Fifth Circuit misapplied *Bruce's Juices,* petitioners point to the scope of the injunctions granted below. Of the five sections in the Carolina injunction decree, only two dealt with the case pending in state court on the debts. No part of the Datatron injunction dealt with a state court action for debt, as no suit had ever been filed. The Circuit Court dealt only with the portion of the injunctions which relate to the debt allegedly owed. Petitioners submit that, not only did the Circuit Court misapply *Bruce's Juices* to the debt-related portion of the injunctions, but the Court also dissolved the remainder seemingly under the same rationale. The rationale of this case was surely never intended to be applied in this manner. The restraint of Leasco from interfering with petitioners' businesses and from enticing, threatening or intimidating their customers had no effect whatever on this Court's desire to prevent "people from getting other people's property for nothing when they purport to be buying it". *Continental Wall Paper Co., supra,* at 271 (dissenting opinion).

Finally, petitioners submit that the case at bar is of the nature envisioned by the court in *Continental Wall Paper Co.* Petitioners alleged a comprehensive scheme of price fixing and tie-in arrangements. The District Court found as to each case that with reference to the antitrust

allegations, there was a reasonable probability at that stage that the petitioner would succeed on the merits of its cause. The royalties allegedly owed were challenged, contrary to the statement of the Fifth Circuit at page 320. It was this so called "royalty" fee which allowed Leasco to carry out its illegal policy. This fee, coupled with the 70% extra-territorial royalty fee, the minimum revenue requirements, and the hardware rental and maintenance charges, all form inherent elements of the illegal practice carried on by Leasco. By overlooking portions of this scheme and basing its conclusion entirely on the 70% clause, the court below failed to correctly apply the decision of this Court in *Continental Wall Paper Co.*

Petitioners submit that by applying the *Bruce's Juices* and its progeny to the situation far beyond its intended coverage, as well as by refusing to apply *Continental Wall Paper Co.*, the Fifth Circuit Court of Appeals rendered a decision in conflict with applicable decisions of this Court, as well as in conflict with the antitrust policy of this nation as expressed in its antitrust laws.

C. Conflict between Circuits

The decision of the Fifth Circuit Court of Appeals below is in direct and irreconcilable conflict with the decision and principles announced by the Seventh Circuit Court of Appeals in *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971). The facts in *Milsen* are almost identical to those in the case at bar.

In *Milsen* the franchisee sought a preliminary injunction against the termination of its franchise agreement

pending the trial of its antitrust suit against the franchisor. The Court of Appeals reversed the District Court's denial of injunctive relief. The Seventh Circuit's reasoning in *Milsen* presents the conflict petitioners here rely upon.

The primary area of conflict between the circuits is the question whether a showing by the franchisee that it will lose its business absent the injunction is a sufficient showing of irreparable harm. The court in *Milsen* relied heavily upon the fact that if the injunction was not granted, the franchisee would be put out of business and, therefore, not able to finance the litigation. *Id.* at 367. *Milsen* suggests that putting the plaintiff out of business before the legal claims are tried is a legally sufficient showing to warrant a finding of irreparable injury, giving the public interest in encouraging antitrust transactions by private parties. *Id.* at 366, 367. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 484 (1968).

The Fifth Circuit, however, refused to accept this approach. It cited with approval the result of *Helfenbein*, even though, ". . . [i]t was clear that the effect . . . was to terminate the franchisee's business." *Response of Carolina* at 320. The Fifth Circuit also noted that in order for the fact of termination to effect its decision the termination would have to be the result of the franchisee's refusal to ". . . [c]omply with practices violative of the antitrust law . . ." *Id.* at 320.

Petitioners submit that the approach in *Milsen* is correct, as it better carries out the principles set forth by Congress in the passage of §4 of the Clayton Act, 15 U.S.C. §15. The "private attorneys-general" section has had great

efficacy in enforcement of the antitrust laws of this nation. The Fifth Circuit has undermined that policy with its holding below. If a franchisee in antitrust litigation is ever to stand a chance of success as against a franchisor, the courts cannot allow its economic slaughter. Most financial arrangements between franchisor and franchisee, as in the case at bar, are so fraught with economic entanglements and obligations that it is possible for a franchisor to "legitimately" end the existence of the franchisee upon filing of a suit, thus effectively destroying the economic base from which the franchisee finances often long and expensive antitrust litigation.

Petitioners herein, as most plaintiffs in antitrust suits, are more interested in finishing this litigation with an extant business than in collecting a large judgment after these businesses and reputations have been destroyed. Petitioners respectfully submit that this conflict between the circuits is of great importance and should be resolved by this Honorable Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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BY: /s/ Jos. W. Womack
JOS. W. WOMACK

BRADFORD, WILLIAMS, McKAY,
KIMBRELL, HAMANN &
JENNINGS, P.A.
J. KIRK WOOD,
Of Counsel.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was served upon the attorneys of record for Respondent, FOWLER, WHITE, HUMKEY, BURNETT, HURLEY & BANICK, P.A., Fifth Floor, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 18th day of October, 1974.

BY: /s/ Jos. W. Womack
JOS. W. WOMACK
Counsel for Petitioners,
Response Of Carolina, Inc., and
Datatron Corporation

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APPENDIX A

15 U.S.C. §26

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

28 U.S.C. §1651

WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX C

Rule 65.

INJUNCTIONS

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be

required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

RESPONSE OF CAROLINA,
Plaintiff-Appellee,

v.

LEASCO RESPONSE, INCORPORATED et al.,
Defendants-Appellants.

RESPONSE OF CAROLINA, INC.,
Plaintiff-Appellee,

v.

LEASCO RESPONSE, INCORPORATED, et al.,
Defendants-Appellants.

DATATRON CORPORATION, d/b/a
Response of Louisville,
Plaintiffs-Appellees,

v.

LEASCO RESPONSE, INCORPORATED et al.,
Defendants-Appellants.

Nos.73-3362, 73-4008, 73-4009.

United States Court of Appeals,
Fifth Circuit.
July 31, 1974.

Franchisees of computer centers brought actions against franchisor for violation of antitrust laws and one franchisee sought preliminary injunction prohibiting franchisor from prosecuting further its state court action seeking unpaid royalties and rentals and possession of leased

computer equipment. Second franchisee sought preliminary injunction prohibiting any actions by franchisor resulting in termination of its business. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., issued the requested preliminary injunctions and the franchisor appealed. The Court of Appeals, Tuttle, Circuit Judge, held that where contract provisions on which franchisor sued in state court did not further alleged anticompetitive practices, franchisees were not entitled to preliminary injunctions prohibiting franchisor from prosecuting state court actions againt franchisees.

Reversed and remanded.

1. Monopolies †21.1(1)

When conduct actually prohibited by antitrust laws is sought to be enforced in a state court action, antitrust defense is valid block to the action. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

2. Monopolies †21.1(1)

Where recovery sought in state or federal court proceeding is premised on an obligation collateral to but independent of agreement which allegedly violates antitrust laws and it is not necessary to depend on or enforce an agreement violative of the antitrust laws in order to grant the requested relief, suit is not barred on theory that agreement is violative of the antitrust laws. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

3. Courts †508(2)

If contract provisions sued on in state court by party who is a defendant in a separate antitrust action do not embody or further anticompetitive practices challenged in the antitrust action, there has been no irreparable loss or damage from alleged violation of antitrust laws and federal court in which the antitrust action has been brought may not issue a preliminary injunction against prosecution of the state court action. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

4. Courts †508(2)

Franchisees which brought antitrust actions against franchisor of computer centers and which alleged that clause of franchise agreement imposed an illegal territorial restraint and that franchisor discriminated against franchises in favor of centers owned by franchisor were not entitled to preliminary injunctions prohibiting franchisor from prosecuting actions against franchisees in state courts to recover royalties and equipment rentals under franchise and lease agreements and possession of leased equipment where monies sought by franchisor were not due under the clause challenged in the antitrust actions. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26; 28 U.S.C.A. § 2283.

* * *

John R. Kelso, Harold L. Ward, Miami, Fla., Morton L. Ginsberg, New Cork City, for defendants-appellants.

Joseph W. Womack, J. Kirk Wood, Miami, Fla., for plaintiffs-appellees.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant-defendant, Leasco Response, Inc. (Leasco), appeals the issuance of preliminary injunctions in these consolidated cases by the district court as requested by appellees-plaintiffs, Response of Carolina (Carolina) and Datatron Corporation (Datatron). The injunctions grew out of anti-trust actions filed by Carolina and Datatron against Leasco.

FACTS

Carolina, a North Carolina corporation, and Datatron, a Kentucky corporation, entered into contracts with Leasco, one consisting of a franchise agreement involving certain computer programing (software) and the other a computer equipment lease (hardware). The franchise agreement committed Carolina and Datatron to pay to Leasco a franchise fee and royalty payments equal to 15% of their gross receipts. The equipment lease provided for a monthly rental charge with additional maintenance costs. Carolina ceased, on approximately April, 1972, and Datatron on approximately July, 1973, making rental and royalty payments to Leasco. Shortly after each franchisee terminated contractual payments, they filed the instant suits against Leasco alleging violations of the Sherman and

Clayton Acts and certain state laws. One anti-trust allegation charges an illegal territorial restraint in the form of a contract provision requiring a 70% royalty on sales made by the franchisee outside of its primary area of responsibility. The second contends that Leasco discriminates against Carolina and Datatron, as franchisees, in favor of Leasco's company-owned computer centers (preferential dealings).

On the day prior to Carolina's filing its action, Leasco brought suit on the contractual agreements in the state courts of North Carolina seeking the unpaid royalties and rentals and the recovery of possession of the leased computer equipment. Carolina maintains that the contracts are void under the federal anti-trust laws[1] and, therefore, unenforceable. The Antitrust laws vest exclusive anti-trust jurisdiction in the federal courts, 15 U.S.C.A. § 4. For that reason, a defense based on federal antitrust laws cannot be litigated in the state court action filed by Leasco. As part of its relief in the anti-trust action, therefore, Carolina sought a preliminary injunction against Leasco from prosecuting further the state court suit, alleging that its successful effect would be to end Carolina's business.

As part of its relief, Datatron also sought an injunction to block any actions by Leasco which would result in the termination of its business. No suits were pending by Leasco against Datatron at the time of the hearing on the preliminary injunction.

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[1]See section 1 of the Sherman Act, 15 U.S.C.A. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The district court agreed with Carolina and Datatron, and issued the requested injunctions. In Carolina's suit, the court prohibited Leasco from prosecuting the state court action and interfering with the ordinary course of Carolina's business.[2] In Datatron's suit, the court enjoined Leasco

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[2]The pertinent part of the injunction reads:

"The Defendant, Leasco Response, Inc., it's retainers, attorneys, officers, agents, servants, employees and all others in active concert or participation with said Defendant, to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

A) Further prosecuting or calling on for hearing, any motion or other application in Cause No. 73 — CVS 8500 styled:

Leasco Response, Inc.

vs.

Response of the Carolinas Inc., et al

now pending in the Superior Court of Mecklenburg County, North Carolina, which motion or prosecutorial application has as its object either the securing of a money judgment by Leasco against Response or the repossession of computer hardware, attachments, parts, or components which are by their nature essential to the continuing operation of Plaintiff's business.

b) Doing any act or thing the effect or probable fruition of which will disturb the status quo of the described State Court litigation in Mecklenburg County pending further order of this Court or any transferee court.

c) Disconnecting, interrupting or otherwise rendering inoperative, interstate telephone trunks, lines, cables or other links between Plaintiff's business and Leasco's computers at Bethesda, Maryland or elsewhere.

d) Threatening, intimidating, obstructing, or in anywise interfering with the officers, agents, and employees of the Plaintiff, Response of Carolina, Inc. in the ordinary and customary course of its business activities.

e) Enticing, threatening or intimidating Plaintiff's customers in any way. The Court intends that Leasco and those acting for it refrain from further soliciting Plaintiff's customers away, from telephoning, writing or otherwise contacting the Plaintiff's present customers in pursuit of any objective to encourage said customers not to do business with the Plaintiff for whatever reason, and from calling or writing Plaintiff's customers advising them that the Plaintiff will go out of business or cease operations on a date certain, or other like conduct."

from failing to perfrom any act under the contracts and from removing any equipment from Datatron's possession.[3] Leasco appeals from the issuance of these preliminary injunctions.

In sum, Leasco challenges the injunctions on the grounds that enjoining the state court action in the Carolina suit and apparently prohibiting the institution of any state court action in the Datatron suit (1) have no legal basis under anti-trust law, specifically, 15 U.S.C.A. § 26,

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[3]The pertinent part of the injunction reads:

"The Defendant, LEASCO RESPONSE, INC., its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said Defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained under further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the Plaintiff.

2. Removing any equipment, components or parts (hardware) from the Plaintiff's possession, control, custody or property.

3. From harassment, interruption, or interferring with Plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the Plaintiff toward the Defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the Plaintiff's equipment room. In this connection and in keeping with the Defendant's request, Plaintiff may if it desires cause the drives to be moved from storage to the described location, the Defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the Plaintiff, preparatory to the Plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the Plaintiff has moved to its 'new' premises or quarters.

7. From refusing to deal with the Plaintiff or do other business pending the conclusion of the above styled litigation."

and are not valid under the legal standards governing the granting of preliminary injunctions; and (2) are prohibited by the anti-injunction statute, 28 U.S.C.A. § 2283.[4]

15 U.S.C.A. § 26 AND PRELIMINARY INJUNCTIONS

Injunctive relief is provided as a remedy by law in anti-trust suits, 15 U.S.C.A. § 26. This provision states:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."

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[4]Of course, the injunction in the Datatron suit would not trample on the dictates of section 2283 against enjoining state proceedings. The Supreme Court explained in Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), that section 2283, is not a bar to a federal injunction preventing the institution of state court proceedings, but only prohibits stays of pending suits. See Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973).

The above statutory provision also incorporates the standards for issuing a preliminary injunction established by equity. These were set out by this Court in Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572-573 (5th Cir. 1974):

> ". . . It [the district court] must exercise that discretion in light of what we have termed 'the four prerequisites for the extraordinary relief of preliminary injunction.' Allison v. Froehlke, 5 Cir. 1972, 470 F.2d 1123, 1126. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. DiGiorgio v. Causey, 5 Cir. 1973, 488 F.2d 527; Blackshear Residents Organization v. Romney, 5 Cir. 1973, 472 F.2d 1197."

Measured under these principles and the case law and implications flowing from the Supreme Court's decision in Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947), and Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959), we find that the district court's injunctions cannot stand, because there was no irreparable loss or damage caused by a violation of the federal anti-trust law.

The appellees' position, in which the district court concurred, is that the franchising and leasing agreements violate the anti-trust law and are invalid. Since Leasco is suing on these contracts in state court where there is no jurisdiction to grant the relief mandated by the anti-trust law, the district court enjoined the pending state court proceeding against Carolina and the institution of a state court suit against Datatron, because irreparable injury would be accomplished by effectively terminating Carolina's and Datatron's businesses. There is, however, an erroneous assumption in appellees' and the district court's syllogism. The Supreme Court postulated in Bruce's Juices and Kelly, and lower courts developed the rule,[5] that the anti-trust laws on the theory asserted by appellees, void for illegality, provide no defense for actions under state law for collection of debts for sale of goods and services.

In Bruce's Juices, a suit filed in state court, the issue squarely presented to the Supreme Court was whether "notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act." 330 U.S. at 744, 67 S.Ct. at 1015. The Supreme Court assumed that the anti-trust violations were established and held that Congress had not meant to provide the additional remedy requested of allowing "a buyer to get his goods for nothing because

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[5]Denison Mines, Ltd. v. Michigan Chemical Corp., 469 F.2d 1301, 1309 (7th Cir. 1972); El Salto, S.A. v. P.S.G. Co., 444 F.2d 477, 482-483 (9th Cir.), cert. denied, 404 U.S. 940, 92 S.Ct. 273, 30 L.Ed.2d 253 (1971); Dickstein v. DuPont, 443 F.2d 783, 785-787 (1st Cir. 1971); Sunshine Packers, Inc. v. American Can Co., 395 F.2d 86 (5th Cir. 1968); Lewis v. Seanor Coal Co., 382 F.2d 437, 441 (3rd Cir. 1967), cert. denied, 390 U.S. 947, 88 S.Ct. 1035, 19 L.Ed.2d 1137 (1968).

the seller violated the Act . . ." 330 U.S. at 752, 67 S.Ct. at 1019. Likewise, in Kelly a similar effort to assert an antitrust defense to a suit filed in federal court for debt on goods sold and delivered was attempted; the Supreme Court reaffirmed the Bruce's Juices holding:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.
>
> * * *
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> "In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is Continental Wallpaper Co. v. Lewis Voight & Sons Co., 212 U.S. 227, [29 S.Ct. 280] [53 L.Ed. 486,] much relied on by petitioner. There the Voight Company had made purchases from Continental, a corporation which existed only as a selling agent for numerous wallpaper companies doing business in a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of the opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. 212 U.S. at 261, [29 S.Ct. 280]. . . . Past the point where the judgment of the

> Court would itself be enforcing this precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' Continental Wallpaper v. Lewis Voight & Sons Co., supra, at 271 [29 S.Ct. 280.] (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. Bruce's Juices, Inc. v. American Can Co., supra, [330 U.S.] at 753-754, [67 S.Ct. 1015], is avoided by treating the defense as so confined." 358 U.S. at 518, 520-521, 79 S.Ct. at 431, 432.

[1, 2] Both Bruce's Juices[6] and Kelly[7] carve out an exception under Continental Wallpaper Co. v. Lewis Voight & Sons Co., 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1909), that when the conduct actually prohibited by the anti-trust act is sought to be enforced in a state court action, the anti-trust defense is a valid block.[8] In sum, where recovery in the state court proceeding (or a federal court proceeding) is premised on an obligation collateral to but independent of the agreement which violates the anti-trust law and where it is not necessary for the state

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[6]330 U.S. at 754-755, 67 S.Ct. 1015.

[7]358 U.S. at 520-521, 79 S.Ct. 429.

[8]See Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); Sunshine Packers, Inc. v. American Can Co., supra, 395 F.2d 86; Farbenfabriken Bayer, A. G. v. Sterling Drug Co., 307 F.2d 207, 208-210 (3rd Cir. 1962).

court in granting relief to depend on or enforce the agreement violative of the anti-trust provisions, there is no illegality to bar the state suit.[9]

[3, 4] Having discovered that appellees' theory cannot provide a defense to the state court action, unless the Voight exception is met, the question next becomes whether a preliminary injunction can issue under this theory of illegality.[10] We think not. Helfenbein v. International Industries, Inc.,438 F.2d 1068 (8th Cir. 1971); Red Rock Cola Co. v. Red Rock Bottlers, 195 F.2d 406 (5th Cir. 1952). But cf. Milsen Co. v. Southland Corp., supra, 454 F.2d 363. If the contract provisions sued on in the state court do not embody or further the anti-competitive practices, then there has been no irreparable loss or damage from a violation of the anti-trust law.

The Helfenbein case involves facts very similar to the present situation. There was a franchise agreement between the parties which provided for the subleasing of restaurants and equipment, just as here Leasco is leasing computer and related equipment to Carolina and Datatron. Upon default

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[9]The franchise agreement expressly provided for severability of any clause held to be invalid. Superior Bedding Co. v. Serta Associates, Inc., 353 F.Supp. 1143 (N.D.Ill. 1972). In Kelly, the Supreme Court found that the provision in the commodity sales contract, where the buyer and seller illegally agreed not to sell on the future's market, was separable from the contractual promise to pay for the commodities. 358 U.S. at 516-517, 521, 79 S.Ct. 429. Cf. Lewis v. Seanor Coal Co., supra, 382 F.2d 437.

[10]The difference between prohibiting this defense as a total block to a state court suit as in Bruce's Juices, and, in this case, enjoining the state proceedings until the end of the federal action, is not sufficient to distinguish this situation. The injunction here was issued on the basis and reasoning which was rejected in Bruce's Juices and Kelly.

by the franchisees, the franchisor commenced eviction proceedings in state court. The franchisees then, just as in this case, filed anti-trust suits under the Sherman and Clayton Acts in federal court against the franchisor (alleging illegal tying agreements) and sought a preliminary injunction from the federal court staying the state court eviction actions. Relying on Bruce's Juices and Kelly, the court found no loss or damage by a violation of the anti-trust laws as required by 15 U.S.C.A. § 26 and affirmed the denial of the injunctive relief.

There are two important reasons for narrowly construing, as the court did in Helfenbein, the plea of illegality under the anti-trust laws. First, as stressed heavily by the Supreme Court in Bruce's Juices and Kelly, the availability of such a defense allows contracting parties the benefits of a contract without having to tender consideration. In this case, Carolina and Datatron have accepted from Leasco the use of their computer hardware, their computer software, and their reputation and expertise, without payment. "The Court has refrained from extending judicial sanction to the avoidance of private contracts where to do so is unnecessary. See Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902)." Dickstein v. DuPont, supra, 443 F.2d at 786.

Second, the policy expressed in Bruce's Juices and applied in Kelly denoted that the enumerated statutory remedies in the anti-trust law do not provide for or require

such a broad anti-trust defense to contract actions. To allow the appelles to obtain free goods and services from Leasco as a compensatory measure in the state court and, additionally, to award triple damages in the federal anti-trust suit would exceed the redress established by the anti-trust statute. 330 U.S. at 756-757, 67 S.Ct. 1015.[11]

Nor can the injunctions be upheld under the Voight exception. The substantial amounts owed Leasco by appellees[12] are not argued to be monies due from appellees under the 70% clause for selling outside their territories of primary responsibility (territorial restraint),[13] rather the record reflects that appellees terminated all payments. Neither the rentals on the leased computer hardware nor the maintenance costs nor the unchallenged 15% royalties were paid. The appellees contend that to dissolve the injunctions would allow Leasco to put them out of business. We note,

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[11]In other words, for any damage inflicted by Leasco on Carolina and Datatron which terminates their businesses, which Carolina and Datatron can demonstrate violates the anti-trust law, triple damages can be claimed in the anti-trust suit.

[12]Approximately $86,000 is owed by Datatron and $267,406 by Carolina.

[13]The record reveals that, at least from Datatron, Leasco never received the 70% of the sales receipts for business outside appellees primary area of responsibility. The record does not indicate whether in the state suit against Carolina, Leasco is claiming this 70%. In any event, we note that the Supreme Court in Bruce's Juices refused the illegality defense even though part of the money sought by the seller represented an illegal differential in the price of the goods. See Helfenbein v. International Industries, Inc., supra, 438 F.2d at 1071.

however, that this situation is not one of a franchisor terminating a franchisee because of its failure to comply with the practices violative of the anti-trust law,[14] nor that the alleged anti-trust violation so permeated the franchise agreement that to uphold any of its provisions would be to countenance and enforce an anti-trust violation.[15] Finally, the dictates of Bruce's Juices and Kelly were applied in Helfenbein even though it was clear that the effect there was to terminate the franchisee's business.

In addition, the principles of comity and federalism recognized by this Court in Red Rock Cola Co. v. Red Rock Bottlers, supra, 195 F.2d 406, and affirmed in American Radio Association v. Mobile Steamship Association, Inc., 483 F.2d 1, 6-7 (5th Cir. 1973), mitigate against unnecessarily interfering with pending state court proceedings.[16] Red Rock involved a question similar to the issue in

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[14]Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968); Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965); Bergen Drug Co., Inc. v. Parke, Davis & Co., 307 F.2d 725 (3rd Cir. 1962); Bateman v. Ford Motor Co., 302 F.2d 63 (3rd Cir. 1962).

[15]See Milsen Co. v. Southland Corp., supra, 454 F.2d 363.

[16]The decision in Mitchum v. Foster, 407 U.S. 225, 243, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), indicated that the restraints of federalism and comity were still present even if an injunction fell within an exception to 28 U.S.C.A. §2283. See note 16, infra.

this case, whether an injunction could issue under the anti-trust laws to enjoin a state court suit. This Court reversed the issuance of the preliminary injunctions on the grounds of federalism and comity.[17]

We conclude, therefore, that the judgment granting the preliminary injunctions must be set aside.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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[17]Having determined that the injunctions are invalid under 15 U.S.C.A. §26 and the principles governing the granting of injunctions, there is no necessity to reach the question of whether the anti-trust laws constitute an exception to the anti-injunction statute, 28 U.S.C.A. §2283. Carolina had contended that the enjoining of the state court in North Carolina fell within the exception language in 28 U.S.C.A. §2283, either as "necessary in aid of jurisdiction," Atlantic C. L. R. Co. v. Engineers, 398 U.S. 281, 294-296, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), or as "expressly authorized by Act of Congress," Mitchum v. Foster, supra, 407 U.S. at 228, 92 S.Ct. at 2154; Jennings v. Boenning & Co., 482 F.2d 1128 (3rd Cir. 1970), cert. denied, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973).

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH, Clerk

OFFICE OF THE CLERK
600 Camp Street
New Orleans, La. 70130

October 8, 1974

TO ALL COUNSEL OF RECORD

RE: 73-3362 RESPONSE OF CAROLINA V. LEASCO RESPONSE INCORPORATED

73-4008 RESPONSE OF CAROLINA, INC. V. LEASCO RESPONSE

73-4009 DATATRON CORPORATION V. LEASCO RESPONSE INCORPORATED

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDARD W. WADSWORTH
CLERK

By /s/ Anne G. Parent
Deputy Clerk

cc: Messrs. John R. Kelso
Harold L. Ward
Mr. Morgan L. Ginsberg
Mr. J. Kirk Wood
Mr. Joseph W. Womack

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 73-1082-Civ-CA

RESPONSE OF CAROLINA, INC.,
a North Carolina corporation,

Plaintiff,

vs.

LEASCO RESPONSE, INC.,
a Delaware corporation;
JOHN DOE, TOM DOE, SAM DOE, and
RICHARD ROE,

Defendants.

PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

This cause is before the Court after notice on the application of the Plaintiff, Response of Carolina, Inc. for a provisional and preliminary status quo order enjoining the Defendant, Leasco Response, Inc. and its retainers from further interfering with Plaintiff's business operations or customers at Charlotte, North Carolina or elsewhere and from pursuing for the time being at least, its present efforts to repossess certain computer hardware and components which are necessary and essential to Plaintiff's business operations.

The action of the Court today implies further inquiry and consideration pendente lite of the propriety and wisdom of dissolution, modification or the making permanent of this writ.

The Court has prior to its oral ruling from the bench and the issuance of this order, considered the pleadings and motions filed, the exhibits and documentary evidence offered, the pertinent antitrust Acts, Section 2283 of the Code, Rules 65 and 52(a) among others and the oral testimony of the witnesses John Wright and Joseph Mummaw. Further consideration has been given to the argument of counsel for both parties and to the cases cited both in the brief and in the argument. Being advised in the premises and in consequence of the proofs and authorities, the Court finds and concludes:

First: That as to prehearing notice, counsel for the Defendant, Leasco in both Charlotte and Miami were notified. As to the former, Mr. Hamrick of Fairley, Hamrick, Montieth & Cobb was notified by long distance telephone. As to the latter Mr. Ward of Fowler, White, Humkey, Burnett, Hurley & Banick, P.A. was given written notice and appeared for Leasco at the hearing.

Second: That as to the basic issue of entitlement to relief, the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and quality of the evidence required prior to the entry of restraint orders.

Third: Without regard to the ancillary or pendent jurisdictional counts of the complaint, the Court con-

cludes that, with reference to the antitrust allegations, there is a reasonable probability Plaintiff will succeed on the merits of it's claim.

Fourth: Given the decisions and the Restraint of Trade Acts which vest exclusive antitrust jurisdiction in the Federal judiciary, the Court concludes that the State court cannot for want of such jurisdiction grant the relief which is indicated and is necessary in the case at bar.

Fifth: The granting of restraint will minimally damage the Defendant. In this connection the Court has duly considered the relationship of the parties, one to the other, and the time sequence of Leasco's belated efforts to repossess its computer hardware.

Sixth: Unless restrained the Defendant's present course of action toward and against the Plaintiff will substantially and irreparably damage the Plaintiff's business and very existence.

Seventh: The effectiveness of this injunctive order is conditioned upon the Plaintiff's posting of a good and sufficient bond with the Clerk of Court in the amount of One Thousand Dollars ($1,000.00). In the event that Plaintiff shall post the described bond in cash, the Clerk shall receive the same and give a receipt therefor.

Eighth: The drawing down of all or any part of the bond or monies described in Seventh above shall be done only under the terms of a written order of the Court after hearing.

Ninth: The entry of this order shall not be construed to foreclose or prejudice any future hearing of consideration by the Court of a motion to transfer under 1404(A).

Tenth: The entry of this order shall not be construed to foreclose or prejudice any future hearing or consideration by this Court or any transferee court to dissolve, modify or make permanent this writ.

Eleventh: The parameters of this writ do not include the Judge or Judges of the General Court of Justice — Superior Court Division — Mecklenburg County of the State of North Carolina nor its authority and nothing contained in my order is to be construed to in anywise impose restraint on said officials.

The reasons, authorities and conditions imposed, it is now thereupon ordered adjudged and decreed that:

The Defendant, Leasco Response, Inc., it's retainers, attorneys, officers, agents, servants, employees and all others in active concert or participation with said Defendant, to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

a) Further prosecuting or calling on for hearing, any motion or other application in Cause No. 73-CVS 8500 styled:

Leasco Response, Inc.
vs.
Response of the Carolinas Inc. et al

now pending in the Superior Court of Mecklenburg County, North Carolina, which motion or prosecutorial application has as its object either the securing of a money judgment by Leasco against Response or the repossession of computer hardware, attachments, parts, or components which are by their nature essential to the continuing operation of Plaintiff's business.

b) Doing any act or thing the effect or probable fruition of which will disturb the status quo of the described State Court litigation in Mecklenburg County pending further order of this Court or any transferee court.

c) Disconnecting, interrupting or otherwise rendering inoperative, interstate telephone trunks, lines, cables or other links between Plaintiff's business and Leasco's computers at Bethesda, Maryland or elsewhere.

d) Threatening, intimidating, obstructing, or in anywise interfering with the officers, agents, and employees of the Plaintiff, Response of Carolina, Inc. in the ordinary and customary course of its business activities.

e) Enticing, threatening or intimidating Plaintiff's customers in any way. The Court intends that Leasco and those acting for it refrain from further soliciting Plaintiff's customers away, from telephoning, writing or otherwise contacting the Plaintiff's present customers in pursuit of any objective to encourage said customers not to do business with the Plaintiff for whatever reason, and from calling or writing Plaintiff's customers advising them that the

Plaintiff will go out of business or cease operations on a date certain, or other like conduct.

Done and ordered at Miami, Florida this 16 day of July, 1973, nunc pro tunc as of 7:02 P.M., Friday, July 13, 1973.

/s/ CHARLES B. FULTON
Chief UNITED STATES
DISTRICT JUDGE
for C. CLYDE ATKINS

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 73-1082-Civ-CA

RESPONSE OF CAROLINA, INC.
a North Carolina corporation

v

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation, et al.

Filed Nov 30 1973

ORDER OF MODIFICATION

FINDINGS AND CONCLUSIONS

THIS CAUSE is before the Court on the Petition of the Defendant, Leasco Response, Inc. to vacate or modify the Temporary Injunction heretofore issued as of July 13, 1973. The Court has now conducted three evidentiary hearings in these consolidated causes, which hearings were concerned with the propriety of the granting of injunctive relief and the balancing of the interests of the parties pendente lite. The pleadings and admitted documents of evidence have been considered as well as the testimony given on oath before the Court. The Court has reviewed and reconsidered the Code provisions of 2283, the applicable antitrust Acts; the briefs of counsel the cases cited by counsel for both sides; the representations made by Mr. Leonard Pernick, the President of Leasco; by Mr.

Harold Ward, as counsel for the defendant; by Mr. Joseph Womack, as counsel for the plaintiffs. The court notes that neither side impugns the correctness of any of the representations made to the Court. The Court has duly taken note of the changes in the financial position of the plaintiff since the hearing of July 13, 1973. Being advised in the premises, the court now finds and concludes:

First: The Court has jurisdiction of the cause and the parties thereto.

Second: With due regard to the provisions of Section 2283 of Title 28, the Court is authorized to employ injunctive relief in aid of its exclusive jurisdiction in anti-trust cases.

2. That portion of the defendant's Petition which asks amendment or modification of the writ is granted to the degree and extent as follows:

(a) Beginning October 20, 1973 and on the same day of each month thereafter, plaintiff shall deposit into the Registry of the Court fifteen percent (15%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. The monthly deposit as described here shall be suitably noted as applying against the claim of royalty payments.

(b) Beginning November 1, 1973 plaintiff shall deposit into the Registry of the Court, ten percent

(10%) [but not more than six hundred dollars ($600.00) in any one month] of its total net revenue from whatever source derived, and without regard to any territorial or geographical limitation. Net revenue means all monies received. The monthly payment as here required to be suitably noted as applying against maintenance.

(c) Plaintiff shall furnish monthly to the defendant a statement of its receipts in terms of its sums in its operation. "Receipts" do not include accounts receivable, but they include monies paid, sums received in the operation of the business. The statement shall be furnished simultaneously with the deposit in the Registry of the Court with copies being forwarded to the defendant.

(d) All supplies shipped by defendant to plaintiff are to be on a COD basis.

3. One the condition that the plaintiff complies from time to time as ordered with the requirements which I have imposed in modification, the restraint implicit in the Preliminary Injunction as of July 13, 1973 shall be abided by the defendant.

4. The described Preliminary Injunctive order remains in full force and effect, except insofar as this order modifies or changes its terms.

5. It is the view of the Court that the injunction as modified shall remain in force for only so long as is necessary to an orderly decision of the cause at which time the

writ is to be vacated, further modified or made permanent as the record may warrant.

6. Plaintiff may at its option deposit with the Clerk, *the monies or funds required by this order by check.*

7. No monies on deposit in the Court's Registry are to be disbursed or otherwise drawn down without written order of the Court after hearing.

8. This order and the Preliminary Injunction referred to from time to time concern only the case styled Response of Carolina, Inc. v. Leasco Response, Inc. The Court does not intend that it affect the (3) other causes which are consolidated therewith.

DONE AND ORDERED at Miami, Florida this 30th day of November, 1973, nunc pro tunc as of 6:21 p.m., Thursday, October 18, 1973.

/s/ C. Clyde Atkins
United States District Judge

cc. Joseph Womack, Esq.
Harold Ward, Esq.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 73-1367-Civ-CA

DATATRON CORPORATION,
a Kentucky corporation,
d/b/a RESPONSE OF LOUISVILLE,
Plaintiff,

vs.

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation; JOHN DOE,
TOM DOE, SAM DOE, and RICHARD DOE,
Defendants.

Filed
Oct 2 3:20 PM '73

PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

THIS CAUSE is before the Court after 14 days notice on the Application of the Plaintiff, DATATRON CORPORATION, a Kentucky corporation, for a provisional and preliminary status quo order enjoining the Defendant, LEASCO RESPONSE, INC., a Delaware corporation, its retainers, agents, employees and others acting in concert with said Defendant from: removing computer equipment, parts or components (hardware) from the possession of the Plaintiff at Louisville, Kentucky or elsewhere; from

harrassment, disturbing or otherwise interfering with or disrupting Plaintiff's business operations; and from refusing to deal with the Plaintiff during the pendency of the litigation.

The action of the Court today implies further inquiry and consideration pendente lite of changes in conditions or circumstances which may warrant the dissolution or modification of this order or the entry of a permanent writ.

The court has prior to its oral ruling from the bench (at approximately 4:25 p.m., Friday, September 21, 1973) and the issuance of this order, considered the pleadings and motions filed; the exhibits and documentary evidence admitted, the pertinent antitrust acts; Section 2283 of the Code; controlling case law; the stipulation of counsel concerning jurisdiction and doing business; Rules 65 and 52(a) among others; the oral testimony of the witnesses at the hearing and argument of counsel for both sides. In consequence, the Court finds and concludes:

First: The Defendant, Leasco, is doing business with the Southern District of Florida.

Second: The Court has jurisdiction of the parties and the cause.

Third: That as to the basic issue of entitlement to relief the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and type of evidence required by law to support the entry of restraint orders.

Fourth: Without regard to the pendent jurisdictional counts the Court concludes at this stage that with reference to the antitrust allegations, there is a reasonable probability that the Plaintiff will succeed on the merits of its cause.

Fifth: The granting of the restraint sought will do minimal damage to the Defendant, given the conditions herein imposed by the Court upon the Plaintiff to effectuate the writ.

Sixth: Unless the Defendant is restrained, damage to the Plaintiff will in all liklihood be substantial and irreparable. It is likely that unless the status quo is kept Plaintiff's business will cease to operate.

Seventh: The effectiveness of this order is conditioned upon the Plaintiff doing the following:

A) Within five (5) days Plaintiff shall post with the Clerk of Court a cash or other good and sufficient bond in the amount of $2,500.00.

B) At its next regular monthly "royalty" payment date; Plaintiff shall pay into the registry of the Court 15% (Fifteen) of its total dollar income derived (monies received) from the use of Leasco's mark or equipment.

C) After making the first payment as required by (B) above, Plaintiff shall thereafter and once each month make a similar payment into the registry. The 15% calculation to be made in the manner set out in (D) below. Plaintiff shall have a reasonable time after

the monthly income can be calculated in which to transmit the funds by mail from Louisville, Kentucky to Miami, Florida.

D) In the calculation of its income from sales Plaintiff shall include all monies derived from all sales without regard to territorial or geographical location(s).

D) At the next regular due date mentioned in the Franchise Agreement and its attached exhibits, Plaintiff shall pay into the registry of the Court 10% (Ten) of its total sales derived (monies received) from the use of Leasco's mark or equipment. The same to be considered toward rental as distinguished from "royalty" as contemplated by (B) above.

F) Calculation of the 10% (Ten) required in (E) to be made as in (D) above.

G) After making the first payment as required in (E) above Plaintiff shall thereafter on each succeeding (monthly) anniversary date make a similar payment into the registry. Calculation of the 10% (Ten) to be made as above described in (D) and (E).

H) In the event the calculated 10% (Ten) based on sales income shall exceed the amount set out in the contract the figure contained in the contract shall control.

Eighth: Plaintiff will keep its billing and sales income and payments records in an orderly way or fashion so that

the Court and counsel may inspect them on reasonable notice and as necessary from time to time. Plaintiff is to furnish (periodically) counsel for the Defendant, Leasco, with a copy of such records.

Ninth: Plaintiff will keep current in payments for maintenance performed by the Defendant, Leasco. The Court intends that these payments be made directly by Plaintiff to the Defendant.

Tenth: The disbursement or drawing down of any bond or registry monies described in this order shall be done only under the terms of a written order of Court after hearing.

Eleventh: In the event Plaintiff shall elect to post a cash bond as required by this order, the Clerk shall give a receipt therefor.

The reasons, authorities and conditions imposed considered and the Court being advised in the premises, it is now, thereupon,

ORDERED, ADJUDGED AND DECREED THAT:

The Defendant, LEASCO RESPONSE, INC. its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said Defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the Plaintiff.

2. Removing any equipment, components or parts (hardware) from the Plaintiff's possession, control, custody or property.

3. From harrassment, interruption, or interferring with Plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the Plaintiff toward the Defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the Plaintiff's equipment room. In this connection and in keeping with the Defendant's request, Plaintiff may if it desires cause the drives to be moved from storage to the described location, the Defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the Plaintiff, preparatory to the Plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the Plaintiff has moved to its "new" premises or quarters.

7. From refusing to deal with the Plaintiff or do other business pending the conclusion of the above styled litigation.

DONE and ORDERED at Miami, Florida the 25th day of September 1973 nunc pro tunc as of 4:25 p.m., Friday, September 21, 1973.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 73-1367-Civ-CA

DATATRON CORPORATION,
a Kentucky corporation, d/b/a
RESPONSE OF LOUISVILLE

Plaintiff

v

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation;
JOHN DOE, TOM DOE, SAM DOE and
RICHARD DOE,

Defendants

Filed Nov 30 1973

AMENDED PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

THIS CAUSE has come before the Court on a motion by the Defendant, Leasco Response, Inc. to modify the Preliminary Injunction entered by this Court on September 25, 1973. Upon consideration of the record in this cause and the Court being otherwise duly advised, the Order of September 25 (filed October 2, 1973) is amended to read as follows:

THIS CAUSE is before the Court after 14 days notice on the Application of the Plaintiff, DATATRON CORPORATION, a Kentucky corporation, for a pro-

visional and preliminary status quo order enjoining the defendant, Leasco Response, Inc., a Delaware corporation, its retainers, agents, employees and others acting in concert with said Defendant from: removing computer equipment, parts or components (hardware) from the possession of the Plaintiff at Louisville, Kentucky or elsewhere; from harrassment, disturbing or otherwise interfering with or disrupting Plaintiff's business operations; and from refusing to deal with the Plaintiff during the pendency of the litigation.

The action of the Court today implies further inquiry and consideration pendente lite of changes in conditions or circumstances which may warrant the dissolution or modification of this order or the entry of a permanent writ.

The Court has prior to its oral ruling from the bench (at approximately 4:25 p.m., Friday, September 21, 1973) and the issuance of this order, considered the pleadings and motions filed, the exhibits and documentary evidence admitted, the pertinent antitrust acts; Section 2283 of the Code; controlling case law; the stipulation of counsel concerning jurisdiction and doing business; Rules 65 and 52(a) among others; the oral testimony of the witnesses at the hearing and argument of counsel for both sides. In consequence, the Court finds and concludes:

First: The defendant, Leasco, is doing business with the Southern District of Florida.

Second: The Court has jurisdiction of the parties and the cause.

Third: That as to the basic issue of entitlement to relief the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and type of evidence required by law to support the entry of restraint orders.

Fourth: Without regard to the pendent jurisdictional counts the Court concludes at this stage that with reference to the antitrust allegations, there is a reasonable probability that the Plaintiff will succeed on the merits of its cause.

Fifth: The granting of the restraint sought will do minimal damage to the defendant, given the conditions herein imposed by the Court upon the plaintiff to effectuate the writ.

Sixth: Unless the defendant is restrained, damage to the plaintiff will in all likelihood be substantial and irreparable. It is likely that unless the status quo is kept plaintiff's business will cease to operate.

Seventh: The effectiveness of this order is conditioned upon the plaintiff doing the following:

A. Within five days plaintiff shall post with the Clerk of Court a cash or other good and sufficient bond in the amount of $2,500.00.

B. At its next regular monthly "royalty" payment date which for the month of September is the 10th day of October, and on the same day of each month thereafter, plaintiff shall deposit into the Reg-

istry of the Court fifteen percent (15%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. The monthly deposit as described herein shall be suitably noted as applying against the claim of royalty payments.

C. At the next regular due date mentioned in the Franchise Agreement and its attached exhibits, and on the same day of each month thereafter, plaintiff shall pay into the Registry of the Court Ten Percent (10%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. This payment is to be considered toward rental as distinguished from "royalty" as contemplated in "B" supra.

D. In the event the calculated ten percent (10%) based on sales income shall exceed the amount set out in the contract the figure contained in the contract shall control.

Eight: Plaintiff shall furnish monthly to the defendant a statement of its receipts in terms of its sums in its operations. "Receipts" do not include accounts receivable, but they include monies paid, sums received in the operation of the business. The statement shall be furnished simultaneously with the deposit in the Registry of the Court with copies being forwarded to the defendant.

Ninth: Plaintiff will keep current in payments for maintenance performed by the defendant, Leasco. The Court intends that these payments be made directly by plaintiff to the defendant. All supplies shipped by defendant to plaintiff are to be on a COD basis.

Tenth: The disbursement or drawing down of any bond or registry monies described in this order shall be done only under the terms of a written order of Court after hearing.

Eleventh: In the event plaintiff shall elect to post a cash bond as required by this order, the Clerk shall give a receipt therefor.

The reasons, authorities and conditions imposed considered and the Court being advised in the premises, it is now, thereupon,

ORDERED, ADJUDGED AND DECREED THAT:

The defendant, LEASCO RESPONSE, INC. its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the plaintiff.

2. Removing any equipment, components or parts (hardware) from the plaintiff's possession, control, custody or property.

3. From harrassment, interruption, or interfering with plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the plaintiff toward the defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the plaintiff's equipment room. In this connection and in keeping with the defendant's request, plaintiff may if it desires cause the drives to be moved from storage to the described location the defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the plaintiff, preparatory to the plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the plaintiff has moved to its "new" premises or quarters.

DONE AND ORDERED at Miami, Florida this 30th day of November, 1973, nunc pro tunc as of 4:25 p.m., Friday, September 21, 1973.

/s/ C. Clyde Atkins
United States District Judge

cc. Joseph Womack, Esq.
Harold L. Ward, Esq.

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Supreme Court, U.
FILED
NOV 18 1974
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-455

RESPONSE OF CAROLINA, INC.
and
DATATRON CORPORATION,
Petitioners,

against

LEASCO RESPONSE, INC., et al.
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Of Counsel,
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MIAMI REVIEW — 871-4[illegible] — 877-[illegible]

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in the
Supreme Court
of the
United States
OCTOBER TERM, 1974

No. 74-455

RESPONSE OF CAROLINA, INC.
and
DATATRON CORPORATION,
Petitioners,

against

LEASCO RESPONSE, INC., et al.
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This Response to petitioners, Response of Carolina, Inc. ("Carolina") and Datatron Corporation ("Datatron") Petition for Writ of Certiorari is submitted by defendant Leasco Response, Inc. ("Leasco"). Other named defendants, bearing the appellation "John Doe," "Richard Roe," etc. have not been identified by petitioners or served with a summons, complaint or injunction.

QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF A PRELIMINARY INJUNCTION BARRING RESPONDENT FROM PROSECUTING ITS SUIT FOR SUMS DUE AND OWING IN THE NORTH CAROLINA STATE COURTS AND FROM INSTITUTING A SIMILAR SUIT IN THE KENTUCKY STATE COURT WHERE THE SUMS OWED WERE NOT ATTRIBUTABLE TO ANY ANTITRUST VIOLATION ALLEGED BY PETITIONERS.

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

Carolina and Datatron are two of the ten franchisees of Leasco's computer time sharing services. They and Florida Computer Response, Inc. and Response of Colorado, Inc. brought suit in the United States District Court for the Southern District of Florida alleging various breach of contract, fraud and antitrust claims. Only the four franchisees named above have made claims or instituted suit against Leasco.

Each of these four franchises has been in default with respect to the franchise and computer agreements between themselves and Leasco for over two years. To collect the amounts owing for rent of computers and under the franchise agreements, by Carolina and Florida Computer

Response, Inc., Leasco has instituted suit in the North Carolina State Courts against Carolina and the United States District Court for the Southern District of Florida against Florida Computer Response, Inc.

The United States Court of Appeals for the Fifth Circuit vacated an injunction issued by the United States District Court for the Southern District of Florida barring prosecution of the North Carolina State Court action and from instituting an action against Datatron in the Kentucky State Courts. The injunction further enjoined Leasco from exercising its contractual and common law rights to repossess the computers leased by Leasco to Carolina and Datatron.

Petitioners' request for a rehearing by the Fifth Circuit was denied and petitioners did not identify any real conflict among the Circuit Courts pertaining to the issues before it and before this Court. Similarly, petitioners' request for a stay of the Fifth Circuit's mandate was denied on October 29, 1974.

Without waiting for the Fifth Circuit to rule on their request for a stay of the mandate, petitioners filed a petition for Writ of Certiorari with this Court on October 21, 1974, and filed with Associate Justice Powell of this Court a motion for recall of that mandate and application for a stay on October 30, 1974. On November 5, 1974, Justice Powell denied that motion.

B. THE OPINION OF THE FIFTH CIRCUIT

Central to the holding of the Fifth Circuit was its finding, after a thorough review of the record, that:

> "The substantial amounts owed Leasco by appellees are not argued to be monies due from appellees under the 70% clause for selling outside their territories of primary responsibility (territorial restraint), rather the record reflects that appellees terminated all payments. Neither the rentals on the leased computer hardware nor the maintenance costs nor the unchallenged 15% royalties were paid. The appellees contend that to dissolve the injunctions would allow Leasco to put them out of business. We note, however, that this situation is not one of a franchisor terminating a franchisee because of its failure to comply with the practices violative of the anti-trust law, nor that the alleged anti-trust violation so permeated the franchise agreement that to uphold any of its provisions would be to countenance and enforce an anti-trust violation." 498 F.2d at 320.

In light of that finding, the Court addressed petitioners' claim that the institution and prosecution of state court actions by Leasco to recover the substantial amounts due it should be enjoined because they could not assert a claim of violation of §1 of the Sherman Act, 15 U.S.C. §1, as a defense to those claims. The Court, after cogently reviewing the applicable law, ruled that to bar collection of the debt would put petitioners in the unique, enviable and unfair position of using Leasco's computer equipment

and enjoying the benefit of its services and computer programs without paying for them. The court held, 498 F.2d at 319-20:

> "There are two important reasons for narrowly construing, as the court did in *Helfenbein* [v. *International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971)], the plea of illegality under the anti-trust laws. First, as stressed heavily by the Supreme Court in Bruce's Juices [v. American Can Co., 330 U.S. 743 (1947)] and Kelly [v. Kosuga, 358 U.S. 516 (1959)] the availability of such a defense allows contracting parties the benefits of a contract without having to tender consideration. In this case, Carolina and Datatron have accepted from Leasco the use of their computer hardware, their computer software, and their reputation and expertise, without payment. 'The Court has refrained from extending judicial sanction to the avoidance of private contracts where to do so is unnecessary. See Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902).' Dickstein v. DuPont, *supra*, 443 F.2d at 786. Second, the policy expressed in *Bruce's Juices* and applied in *Kelly*, denoted that the enumerated statutory remedies in the anti-trust law do not provide for or require such a broad anti-trust defense to contract actions. To allow the appellees to obtain free goods and services from Leasco as

> a compensatory measure in the state court and, additionally, to award triple damages in the federal anti-trust suit would exceed the redress established by the anti-trust statute. 330 U.S. at 756-757, 67 S.Ct. 1015."

And as the Fifth Circuit also found, to continue a situation such as this would directly controvert:

> "the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' " 498 F.2d at 318.

Noteworthy is the fact that nowhere in their Petition do petitioners claim that the action before the North Carolina State Courts is a sham or instituted for purposes of delay. Instead they claim (*E.g.* Pet. pp 8-9) that if they have to pay their debts — debts which are not attributable to the purported antitrust violations — they will be irreparably harmed and forced to go out of business. In their Motion for Recall of the Mandate and Application for a Stay before Justice Powell, petitioners stated:

> "5. *The irreparable injury to petitioners.* Should the injunctions be dissolved, petitioners' businesses, as more fully set forth in the Petition, will have been destroyed and terminated. Once they are destroyed they cannot be put back together again. . . .
>
> 6. The respondent Leasco Response has, on Tuesday, October 29, 1974, before the United States

> Court of Appeals has issued its mandate, sent telegrams to the petitioners informing them that Leasco would take such measures as to cause the destruction of their businesses. Once the injunctions are dissolved the injury to the petitioners will be irreparable."

This claim is deceptive. Annexed hereto as Appendix I is a copy of the telegram sent to Carolina. That telegram is identical to the one sent to Datatron and provides, in full:

> "We understand the Appellate Court is issuing its mandate which makes final its opinion reversing the trial court injunction. Accordingly, we are proceeding to repossess our equipment by reason of your failures and refusal to pay your past debts to Leasco. All support and maintenance will likewise cease at once. However, if you desire to retain custody of the equipment pending the outcome of the trial in Federal Court in Miami, we are willing to postpone any repossession and to continue supporting you until the jury determines the merits of our claims provided that you pay in the court registry the amounts Leasco is owed per its billings to you and the terms of the contract between us and to remain current. If you wish to discuss this matter at all, we are at your disposal.* Leasco Response Inc. Leonard J. Pernick, President."

Carolina and Datatron, therefore, will suffer no irreparable harm if the injunction is dissolved since they need

*Despite Leasco's offer to discuss this issue, not a word has been heard from Carolina or Datatron.

only pay the money due Leasco into the Court registry to avoid repossession by Leasco of its computers and related equipment pending the outcome of the trial in the Miami District Court. If they prevail at trial, they will be protected and the District Court will be able to return to them the sums they are entitled to, if any.

Moreover, through payment of the amounts they owe, Carolina and Datatron will obtain the support and maintenance benefits of the contracts they breached through failure to make the required payments and which they assert are illegal. Thus, their business will not be destroyed pending trial.

In contrast, should the injunction continue, the harm to Leasco is severe. Petitioners would have this Court put Leasco in the impossible position of having to comply with contracts that the petitioners claim are illegal while petitioners fail to make the payments called for by these contracts for the services and use of the equipment those contracts entail. Petitioners would prefer to challenge the contracts on the one hand and reap their benefits on the other — a situation manifestly unjust.

SUMMARY OF ARGUMENT

The Petition for Certiorari should not be granted because it presents neither a substantial federal question nor an actual conflict among the various Circuit Courts, because the Fifth Circuit's holding was fully consistent with prior decisions of this Court, because the action before the North Carolina State Courts was not a "sham" and because to continue with the injunctions would work substantial injustice.

ARGUMENT

POINT I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE PRESENTS NO SUBTANTIAL FEDERAL QUESTIONS AND NO CONFLICT AMONG THE CIRCUITS OR WITH THE DECISIONS OF THIS COURT.

Examination of the Fifth Circuit's opinion shows a careful and cogent analysis of existing law and policy and a careful concern for avoiding trespass on State Court jurisdiction.

Petitioners attempt to justify their petition by arguing the standard contentions: that the case presents an important federal question; that the Fifth Circuit acted in conflict with applicable decisions of this Court; and that this case presents a situation in which the Circuits are in conflict. These are easily dispensed with.

First, they argue that the important federal question presented here is whether injunctive relief in antitrust actions is limited to the standards of 15 U.S.C. §26 or may also be applied pursuant to the All Writs Act, 28 U.S.C. §1651. This contention misstates the issue.

No substantial federal question is presented here by the availability of the All Writs Act as a statutory grant of power providing that federal courts of appropriate jurisdiction "may issue" injunctions in aid of that jurisdiction "and agreeable to the usages and principles of law." 28 U.S.C. §1651. The All Writs Act dates from the Judiciary Act of 1789. 9 Moore's *Fed. Pract.* §110.26 at 277-8 (1970). By use of the word "may" in the All Writs Act, Congress

entrusted the proper exercise of the issuance of writs to the discretion of the Court and Congress, in enacting 15 U.S.C. §26 over a hundred years later as part of the antitrust laws was obviously specifying the standards applicable to such discretion by which "a preliminary injunction may issue". 15 U.S.C. §26.

In *United States v. FMC Corporation et ano*, ____U.S.____, 84 S.Ct. 4, 8 (1963), Justice Goldberg of this Court held that the All Writs Act did not override the specific standards of Enabling Act, 15 U.S.C. §28, 29. He noted that Congress, in enacting the Enabling Act set forth the standards to be applied in questions arising in the limited area by the Enabling Act notwithstanding the open ended provisions of the All Writs Act. Here the same considerations obtain. Congress, in 15 U.S.C. §26, has legislated in the specific area of the use of injunctive relief in antitrust actions and set forth the standards applicable thereto.

Thus, where the All Writs Act, on its face, states that federal courts may issue "all writs necessary *or appropriate* in aid of their respective jurisdictions and *agreeable to the usages and principles of law.*" (Emphasis supplied). This language is but another way of stating that the courts are to apply principles of law in exercising their discretion — principles which are contained in 15 U.S.C. §26 as interpreted by the courts. The question of appropriate grant of certiorari turns, therefore, not on the availability of the All Writs Act, but on the application of law.

Second, the Fifth Circuit's opinion was consistent with this Court's holdings in *Kelly v. Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959) and *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed.

1219 (1947). Petitioners do not argue that the Fifth Circuit incorrectly relied on or interpreed *Kelly v. Kosuga, supra* and that omission should be dispositive of their Petition for Certiorari. This Court in *Kelly* ruled, 358 U.S. 520-1, that:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."

Here, to forbid the State Courts of North Carolina and Kentucky from determining whether Leasco may repossess its equipment due to petitioners' defaults, where those defaults have nothing to do with the alleged antitrust claim, would permit the petitioners to get Leasco's property for nothing when they purport to be leasing it.

To the same effect is *Bruce's Juices*. There, this Court held that even were it assumed that a pricing structure violated the Robinson-Patman Act, that defense could not be asserted in an action to collect overdue bills based on that pricing structure as to do so would permit the buyer to acquire his goods for nothing. 330 U.S. 752.

Petitioners attempt, Pet. p. 11, to distinguish *Bruce's Juices* on the tangential ground that permitting the antitrust defense there would have foreclosed Plaintiff from litigating the debts in question and that, in their view, the result would merely affect Plaintiff's profit. These contentions have no merit. The Court in *Bruce's Juices* was

rightfully concerned with over-zealous application of antitrust defenses to pure and simple cases based on failure to pay overdue debts. It rationalized that the victim of an antitrust violation could bring his own action for damages unless the violation and the default were so intertwined so as to put the Court in the position of enforcing an antitrust violation. Here, the payments owed by petitioners to Leasco, as the Fifth Circuit noted, are separate and distinct from the alleged violation. Given that finding of fact, the Fifth Circuit would have committed reversible error had it ruled other than it did.

Third, there is no conflict between the Circuits. As evidence of the purported conflict, petitioners cite one case, *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971). They ignore that the Fifth Circuit cited 498 F.2d at 317-20, cases from the Second, Third and Eighth Circuits. Moreover, *Milsen*, as the Fifth Circuit noted, is hardly inconsistent with the holding here. Here, the antitrust issue petitioners presented to the Fifth Circuit is their allegation that Leasco restrained trade through a territorial allocation whereby each of its franchises had an exclusive franchise area.

The franchise fee was 15% of revenues generated within the territory and 70% of revenues generated outside the territory. Leasco has not billed petitioners or any other franchise the 70% charge for sales outside the territory, and the defaults in issue relate not to failures to pay the 70% charge, but through failure to pay other charges. As found by the Fifth Circuit, the defaults do not relate to the alleged antitrust violations.

In *Milsen*, the Court found, 454 F.2d at 367-8 that the default there was a default in paying a franchise fee based on practices prohibited by the antitrust laws, that "Plaintiffs here will lose their stores if they refuse to cooperate with defendants' anticompetitive practices" and "most important, if a court allows defendants to collect the franchise fees or terminate the franchises, it must in effect approve the possible antitrust violations." That, as the Fifth Circuit held, is not the situation in this case for the defaults on the one hand and the alleged antitrust violations on the other are separate and distinct. The Fifth Circuit's opinion hardly conflicts with *Milsen*. Indeed, it is totally consistent with *Milsen* and the decisions of this Court in *Kelly* and *Bruce's Juices*. The alleged conflict is not even apparent, let alone real.

POINT II

THE PETITION SHOULD BE DENIED BECAUSE THE ACTION BEFORE THE NORTH CAROLINA STATE COURTS AND THE PROPOSED ACTION IN THE KENTUCKY STATE COURTS ARE NOT SHAM LITIGATIONS.

Because of its disposition of the issue based on its finding, after a full review of the record, that the amounts Petitioners owe to Leasco do not stem from the purported antitrust claims the Fifth Circuit did not have to decide if to enjoin the North Carolina lawsuit and the proposed Kentucky lawsuit would violate this Court's holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5L.Ed.2d 464 (1961) and its progeny.

Petitioners suggest Pet. p. 13 that the Fifth Circuit did not consider the "inherent elements" of the purported antitrust violations. To the contrary, the Fifth Circuit's opinion clearly reflects a full study of the record. Petitioners would compel the Fifth Circuit to list in its opinions each and every instance it discards a frivolous claim. That has never been the rule for courts are obliged only to treat seriously those claims deserving discussion. In any event, Petitioners make no claim that the Fifth Circuit's finding that the debts owed were legitimate and did not stem from purported violations of the antitrust laws is clearly erroneous. That failure alone bars their attempt to have this Court go through the entire record *de novo.*

Even were the Fifth Circuit's finding clearly erroneous, which it is not, the Petition should not be granted. To continue the injunction would deprive Respondent of its access to state courts to speedily litigate their common law claims. In *Noerr* this Court held that recourse to legislative and administrative branches of government do not violate the antitrust laws unless they were a sham. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 517 (1972), *Noerr* was expanded to cover recourse to agencies and to courts and the "sham" test was defined to mean "without probable cause and without regard to the merits of the cases". In *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379 93 S.Ct. 1022 (1973) the sham test was held to embrace instigation of litigation for the purpose of delay or to retain a monopolistic position.

Here, Leasco was exercising its right to obtain money the Defendants owed to it. The North Carolina litigation and the proposed Kentucky litigation obviously had prob-

able cause for they were based on accounts stated. Moreover, the North Carolina litigation was brought seasonably and, had it been brought later, Plaintiffs might have had the defense of laches. Thus, it was not a sham and therefore not violative of the antitrust laws.

To continue the injunctions would have violated this Court's holdings in *Noerr*, *California Motor Transport Co.* and *Otter Tail* by depriving a party of legitimate access to the Courts. It would also have continued the manifestly unfair position of allowing Petitioners to continue to use Leasco's equipment, its expertise, its name and reputation and its service, all without paying for them. The Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied in all respects.

Respectfully yours,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered on the 15th day of November, 1974 to Joseph W. Womack, Esquire, Attorney for Petitioners, 9th Floor, Dade Federal Building, 101 East Flagler Street, Miami, Florida, 33131.

ANTHONY F. PHILLIPS
Attorney for Respondent
Leasco Response, Inc.
One Chase Manhattan Plaza
New York, New York, 10005

/s/ Anthony F. Phillips

APPENDIX I

This Mailgram is a Confirmation Copy of the following message:

3053586550 TDBN Miami Fl. 141 10-29 0215P EST

PMS Joseph Mummaw, Report Delivery, DLR
4600 Park Rd.
Charlotte, N.C.

We understand the Appelate Court is issuing its Mandate which makes final its opinion reversing the Trial Court Injunction, accordingly we are proceeding to repossess our equipment by reason of your failures and refusal to pay your past debts to Leasco. All support and maintenance will likewise cease at once. However, if you desire to retain custody of the equipment pending the out come of the trial in Federal Court in Miami, we are willing to postpone any repossession and to continue supporting you until the jury determines the merits of our claims provided that you pay in the Court Registry the amounts Leasco is owned per its billings to you and the terms of the contract between us and to remain current. If you wish to discuss this matter at all, we are at your disposal.

Leasco Response Inc Leonard J Pernick President